Tuskegee Area Transportation System *and* Oliver Hooks, Jr. *and* Amalgamated Transit Union, Local 1600. Cases 10–CA–24176 and 10–CA–24554

August 14, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 7, 1991, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief. On November 19, 1991, the Board remanded the proceeding to the administrative law judge for further findings and the issuance of a supplemental decision. On March 6, 1992, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.[4]

The judge, citing *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its work rules to require employees to work both the morning and afternoon shifts, thereby effectively terminating employees Lewis Mobley, Jerome Hammond, and Jorge Huff. Although finding merit in the General Counsel's contention that a discriminatory motive was at least part of the reason for the Respondent's unilateral change, the judge found that it was not necessary to determine whether, under an 8(a)(3) analysis,[5] the employees might have been terminated even in the absence of an unlawful motive because ''it is clear that employees would have been terminated . . . unilaterally and still in violation of Section 8(a)(1) and (5) of the Act.'' The judge concluded that the Respondent violated Section 8(a)(5), (3), and (1) by discriminatorily and unilaterally changing the work schedules of the employees, which resulted in their terminations. We agree with the judge's conclusion that the Respondent's unilateral change in shift schedules and the resulting terminations violated Section 8(a)(5) and (1), but we do so only for the reasons set forth below.

At all relevant times, the Respondent subcontracted with Greyhound Lines, Inc. to provide morning and afternoon rush hour bus service on two routes of the Metropolitan Atlanta Rapid Transit Authority (MARTA).[6] To obtain qualified drivers, the Respondent employed drivers who worked full time for MARTA and who, depending on their schedules, would drive either the morning shift or the afternoon shift for the Respondent.[7] These MARTA drivers included employees Mobley, Hammond, and Huff.

The Union was certified as the collective-bargaining representative of the Respondent's unit employees on September 18, 1989.[8] About November 16, the Respondent received notice of an increase in its workmen's compensation insurance premiums. Thereafter, on November 28, the Respondent sent a letter to each of its MARTA employees stating, in pertinent part, that due to the increased cost of insurance, ''we must cut back in staff by employing persons who can work both, the morning and evening, shifts.''[9] The MARTA employees were not able to work both shifts, and their employment with the Respondent ceased.

As found by the judge, the Respondent sent this letter without giving the Union prior notice or an opportunity to bargain. There can be little doubt that the matter of shifts is a mandatory subject of bargaining. *Georgia Pacific Corp.*, 275 NLRB 67, 69 (1985) (citing *Meat Cutters Local 189 v. Jewell Tea Co.*, 381 U.S. 676, 691 (1965)). Although the Respondent contends that its decision to require employees to work two shifts was an economic one based on ''a fair pre-

[1] We have not considered the evidence submitted with the Respondent's exceptions to the judge's supplemental decision and brief. That evidence is outside the record.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent asserts that the judge's findings are a result of bias and prejudice. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

In agreeing with the judge's jurisdictional findings, we note that the issue of whether the Respondent filed Federal income tax returns is now a matter of public record and best left to the Internal Revenue Service, which will be furnished a copy of this decision. See *Original Oyster House*, 281 NLRB 1153 fn. 1 (1986), enfd. 822 F.2d 412 (3d Cir. 1987); *Hacienda Hotel & Casino*, 279 NLRB 601 fn. 4 (1986).

[3] We agree with the judge's conclusion that the Respondent's March 31, 1989 conduct with respect to employee Oliver Hooks violated Sec. 8(a)(3) and (1) of the Act, but we find that Hooks was indefinitely suspended rather than discharged.

[4] We shall amend the judge's conclusions of law and remedy and modify his recommended Order to conform to the violations found.

[5] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] The Respondent also operated a charter bus service.

[7] The Respondent also employed drivers who were able to drive both shifts.

[8] All dates are in 1989 unless otherwise indicated.

[9] The record contains copies of the letters sent to Hammond and Huff, the text of which is set forth in full in the judge's supplemental decision. Mobley testified that he received a letter like that sent to the other MARTA employees.

diction of the natural consequences of being unable to pay the increase in Workers Compensation insurance and salaries,'' we note that an employer's obligation to bargain about changes in wages, hours, and terms and conditions of employment is not excused by economic expedience, even in good faith. *Master Slack*, 230 NLRB 1054 (1977), enfd. 618 F.2d 6 (6th Cir. 1980).[10] We therefore find, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its work rules to require employees to work both the morning and afternoon shifts.

The Board has applied the following test for determining whether discharges or other forms of discipline violate Section 8(a)(5) of the Act: if an employer's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5). See *Equitable Gas Co*., 303 NLRB 925 at 931 fn. 29 (1991), enf. denied on other grounds 140 LRRM 2521 (4th Cir. 1992); *Great Western Produce*, 299 NLRB 1004 (1990). In *Equitable Gas Co*., above, the Board applied this test where, although the complaint did not specifically allege that employee McHale's discharge violated Section 8(a)(5), the complaint alleged and the General Counsel proved that the relevant appearance guidelines were unlawfully and unilaterally implemented in violation of Section 8(a)(5). In view of the evidence that McHale was disciplined and discharged pursuant to those guidelines, the Board further found that the Respondent's discipline and discharge of McHale also violated Section 8(a)(5).[11]

Here, the complaint did not specifically allege that the terminations of employees Mobley, Hammond, and Huff violated Section 8(a)(5). However, as in *Equitable Gas Co*., above, the complaint alleged and we have found that the Respondent violated Section 8(a)(5) by unilaterally changing its work rules to require its employees to work two shifts. We further find, for the reasons set forth by the judge, that the unlawfully imposed work rules were a factor in the terminations. In this regard, the judge in his decisions rejected the Respondent's contentions that its November 28 letter to the MARTA employees was intended only to generate discussion, that the Respondent intended to retain all the MARTA drivers but to place them on charter bus routes, and that the MARTA drivers were never terminated but were permanently replaced when they went on strike in early December. Rather, the judge found that the November 28 letter effectively terminated the employment of the MARTA drivers who were unable to work both shifts. Under the circumstances, we find that the Respondent violated Section 8(a)(5) and (1) by terminating employees Mobley, Hammond, and Huff. See *Equitable Gas Co*. and *Great Western Produce*, above.[12]

[10] The Respondent has not demonstrated compelling economic circumstances as of November 28 that would justify its changing shift requirements unilaterally, without giving the Union an opportunity to bargain over a proposed change. Cf. *Aquaslide 'N' Dive Corp*., 281 NLRB 219 fn. 2 (1986).

[11] In denying enforcement, the court did not disagree with the Board's test for determining whether discharges violate Sec. 8(a)(5). Rather, the court found that the respondent lawfully adopted the appearance guidelines as part of a program to upgrade its public image.

[12] We find it unnecessary to pass on the complaint allegation that the terminations also violated Sec. 8(a)(3) and (1) as the remedy would not substantially be affected. Cf. *Chef's Pantry*, 274 NLRB 775 fn. 6 (1985).

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 6 and 7.

''6. The Respondent indefinitely suspended employee Oliver Hooks because of his activities on behalf of and his support for the Union in violation of Section 8(a)(3) and (1) of the Act.

''7. After the Board certified the Union on September 18, 1989, as the exclusive collective-bargaining representative of its unit employees, the Respondent, without notifying the Union or giving it an opportunity to bargain, unilaterally changed its work rules to require employees to work both the morning and afternoon shifts, thereby terminating employees Lewis Mobley, Jerome Hammond, and Jorge Huff in violation of Section 8(a)(5) and (1) of the Act.''

AMENDED REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act, we shall order it to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its work rules to require employees to work both the morning and afternoon shifts, we shall order the Respondent to cease and desist from unilaterally instituting any such work rule. Affirmatively, we shall order the Respondent to rescind the rule and to bargain with the Union about any future implementation of any such work rules governing employees represented by the Union.

We shall also order the Respondent to fully restore the status quo ante by expunging from the files of employees all memoranda, reports, and other documents that were given as a result of the changed rule and notify the affected employees, in writing, that this action has been taken. We shall also order the Respondent to offer Lewis Mobley, Jerome Hammond, and Jorge Huff immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority

or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the changed work rule, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[13]

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by indefinitely suspending employee Oliver Hooks because of his union activities, we shall order the Respondent to offer him full and immediate reinstatement and to make him whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, as prescribed in *F. W. Woolworth Co.*, above, with interest as computed in *New Horizons for the Retarded*, above.

ORDER

The National Labor Relations Board orders that the Respondent, Tuskegee Area Transportation System, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and sentiments, and the union activities and sentiments of other employees.

(b) Threatening employees with plant closure or other reprisals for engaging in union activity or choosing Amalgamated Transit Union, Local 1600 to represent them for purposes of collective bargaining.

(c) Soliciting grievances from employees and promising or impliedly promising to remedy the grievances in order to dissuade employees from engaging in union activities.

(d) Indefinitely suspending employees because of their activities on behalf of or support for the Union.

(e) Unilaterally changing work rules by requiring employees to work both morning and afternoon shifts, and thereby effectively terminating employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease giving effect to the November 28, 1989 change in work rules requiring employees to work both the morning and afternoon shifts, and bargain with the Union about any future implementation of any such rule.

(b) Remove from its files any reference to the unlawful indefinite suspensions or terminations of Oliver Hooks, Lewis Mobley, Jerome Hammond, and Jorge Huff, and notify the employees in writing that this has been done and that it will not use the evidence removed against them in any way.

(c) Offer Oliver Hooks, Lewis Mobley, Jerome Hammond, and Jorge Huff immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits resulting from their indefinite suspensions or terminations in the manner set forth in the amended remedy section of the decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail to each of the terminated employees a copy of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] As discussed in *Great Western Produce*, above, 299 NLRB 1004, a respondent employer may avoid having to reinstate and pay backpay to an employee discharged pursuant to an unlawfully instituted rule or policy if the employer demonstrates that it would have discharged the employee even in the absence of that rule or policy. The circumstances surrounding the terminations of Mobley, Hammond, and Huff have been fully litigated. In view of our adoption of the judge's findings that the November 28 letter effectively terminated the employees—including his rejection of the Respondent's defenses—we find that Mobley, Hammond, and Huff are entitled to reinstatement and backpay.

However, in view of the alleged closure of the Respondent's business in July 1991, matters regarding backpay and reinstatement shall be left to compliance. Also in view of the alleged closure, we shall require the Respondent to mail to each of the unlawfully terminated employees a copy of the attached notice marked ''Appendix.''

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union activities and sentiments, and the union activities and sentiments of other employees.

WE WILL NOT threaten employees with plant closure or other reprisals for engaging in union activity or choosing Amalgamated Transit Union, Local 1600 to represent them for purposes of collective bargaining.

WE WILL NOT solicit grievances from employees and promise or impliedly promise to remedy the grievances in order to dissuade employees from engaging in union activities.

WE WILL NOT indefinitely suspend employees because of their activities on behalf of or support for the Union.

WE WILL NOT unilaterally change work rules by requiring employees to work both morning and afternoon shifts, thereby effectively terminating employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and cease giving effect to the November 28, 1989 change in work rules requiring employees to work both the morning and afternoon shifts, and we will bargain with the Union about any future implementation of any such rule.

WE WILL remove from our files any reference to the unlawful indefinite suspensions and terminations of Oliver Hooks, Lewis Mobley, Jermone Hammond, and Jorge Huff and we will notify them in writing that this has been done, and that we will not use the evidence removed against them in any way.

WE WILL offer immediate and full reinstatement to Oliver Hooks, Lewis Mobley, Jerome Hammond, and Jorge Huff to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their indefinite suspensions and terminations, less any net interim earnings, plus interest.

TUSKEGEE AREA TRANSPORTATION-SYSTEM

Frank F. Rox Jr., Esq., for the General Counsel.
Velma L. Jackson, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard these cases on August 1 and 2, 1990, in Atlanta, Georgia. The charge in Case 10–CA–24176 was filed by Oliver Hooks on June 7, 1989. A complaint and notice of hearing issued on August 22, 1989, alleging that Tuskegee Area Transportation System (TATS or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On January 18, 1990, Amalgamated Transit Union, Local 1600 (the Union) filed a charge in Case 10–CA–24554. This was later amended on January 31 and February 23, 1990. On March 2, 1990, an order consolidating cases and consolidated complaint issued in Cases 10–CA–24176 and 10–CA–24554 alleging, inter alia, that Respondent violated Section 8(a)(1), (3), and (5) of the Act by interrogating employees about their union activities, threatening employees, soliciting employee's grievances, discharging Oliver Hooks, and unilaterally changing the work schedules of employees, thereby resulting in the terminations of Lewis Mobley, Jerome Hammonds, and Jorge Huff. In its answer to the consolidated complaint, Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for the General Counsel and Respondent both filed timely briefs with me which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS

I. JURISDICTION

Tuskegee Area Transportation System began business in 1986 by establishing a system of three buses in Tuskegee, Alabama. In July 1988, TATS entered into a minority subcontract agreement with Greyhound Lines, Inc., to provide rush hour bus service on two routes of the Metropolitan Atlanta Rapid Transit Authority (MARTA). TATS also operates a charter bus service with frequent trips in and between Georgia and Alabama. Respondent admits and stipulated to the Board having statutory jurisdiction. Respondent asserts, however, that it does not meet the Board's discretionary jurisdictional standards. While Respondent attempted to develop this issue to some extent at trial, its posttrial brief is virtually silent on this issue.

Based on the record, I find that Respondent is precluded from raising a lack of discretionary jurisdiction as a defense.

The Union filed a petition for an election among Respondent's employees in Case 10–RC–13901. Thereafter, a hearing was conducted to resolve any issues relating to the representation case. At the trial, John Wright, Respondent's owner, claimed that he did not receive the petition or notice of the representation case hearing. Wright persisted in his denial even though he was shown that he had corresponded with the Board's Regional Office approximately 10 days prior to the representation case hearing. Following the hearing, the Regional Director of Region 10 issued a Decision and Direction of Election. Wright denied ever receiving this, although he admitted receiving election notices from the Board. Wright concedes, too, that he was present for the Board-conducted election held on September 6, 1989. Wright also attempted to claim that he did not receive service of the charges underlying this unfair labor practice proceeding. He claimed, for example, that he does not sign for certified mail. Even after being confronted with his signature on the return receipts for the amended charge in Case 10–CA–24554 and the consolidated complaint, Wright equivocated concerning service of these documents. Simply stated, Wright is one of the least credible witnesses ever to appear before me.

Respondent did not file a request for review of the Regional Director's assertion of jurisdiction in the Decision and Direction of Election. It is well settled that although the existence of statutory jurisdiction may be raised at any time, the issue of discretionary jurisdiction must be timely raised. When Respondent has not sought to contest the Regional Director's assertion of jurisdiction by filing a request for review of his decision, an employer may not raise the issue of discretionary jurisdiction during a subsequent unfair labor practice proceeding. *Pollack Electric Co.*, 214 NLRB 970 (1974); see also *Pickle Bill's, Inc.*, 229 NLRB 1091 (1977).

Even if Respondent could assert lack of jurisdiction as a defense at this late date, I would find counsel for the General Counsel has carried its burden of proof on that issue. The gross annual value of Respondent's contract with Greyhound to operate the two MARTA routes is $222,333. The record is clear that Respondent receives substantial revenues from the operation of charter bus services. Wright himself admitted that charters for two schools in Alabama alone gross an average of $30,000. Wright failed to produce subpoenaed documents which would reflect revenue received from its charter business. His only explanation for not doing so was that his business office in Tuskegee, Alabama, was destroyed by fire in July 1989.[1] Considering the gross annual value of the contract between Respondent and Greyhound for the two MARTA routes, and in view of Wright's own admission concerning gross revenues received from seasonal charters, I would find that counsel for the General Counsel has met its burden of proof and that Respondent meets the Board's $250,000 discretionary standard.

[1] When questioned by me on the point, Wright claimed that no income tax records exist reflecting revenue for the business since 1989 because he has not filed income tax returns for at least the past 2 years. I encourage the Board to refer this matter to the Internal Revenue Service to determine whether Wright and/or TATS have filed required income tax returns. If not, I would encourage them to take appropriate action. If, on the other hand, Wright has in fact filed required returns, then I would encourage the Board to consider appropriate action against Wright for perjury before me.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Amalgamated Transit Union, Local 1600, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Since entering into the minority subcontract agreement with Greyhound Lines, Inc. in July 1988, TATS has provided morning and afternoon rush hour bus service on MARTA routes 148 and 718 in metropolitan Atlanta. During the interim between the morning rush hour and the afternoon rush hour, TATS has no work for the drivers. In order to obtain qualified drivers, Respondent hired full-time MARTA drivers, who, depending on their driving schedules with MARTA, would drive either the morning or the afternoon schedule with Respondent. Full-time afternoon or evening drivers with MARTA would drive the morning rush hour for Respondent, while MARTA drivers with morning routes worked the afternoon rush hour for Respondent.

B. *Union Activity*

It is undisputed that Oliver Hooks was the driving force behind the union organizing campaign of Respondent's employees. In November 1988, Hooks spoke with several of Respondent's drivers about the possibility of union representation. As a MARTA driver, Hooks had been job steward for Local 732 of the Union for about 2-1/2 years. Hooks talked to Respondent's drivers, solicited support, and made whatever contacts were necessary with the Union. In March 1989, after securing union authorization cards, the Union demanded recognition from Respondent.

I credit Hooks that in November 1988, he informed Wright he was signing up employees for the Union. Hooks told Wright that employees of Greyhound Transit that run MARTA routes were discussing a union. Hooks testified candidly that Wright at first replied, ''go ahead and do it. Greyhound's got plenty of damn money.'' According to Hooks, he went on to tell Wright that ''all the employees,'' including those of Greyhound subcontractors were signing up to show solidarity. I do not credit Wright's claim that he was unaware Hooks was involved with the Union prior to Hooks' March 1989 termination. I do, however, credit Wright to the limited extent that he was unaware union activity was directed at his own employees until he received the Union's demand for recognition on March 29, 1989. Wright admitted he was aware of organizing activity as early as December 1988, but he testified he was assured by Hooks that the organizing campaign would not be directed toward his employees but only toward Greyhound. Whether he was told this by Hooks, or by other employees, or was simply mistaken, I find that Wright was unaware union activity involved his employees until March 29.

The remaining discriminatees, Lewis Mobley, Jerome Hammonds, and Jorge Huff, all supported the Union and

signed authorization cards. All three employees were full-time MARTA drivers.

C. *The Union's Demand and Respondent's Interrogation of Employees*

The Union sent Respondent a letter dated March 27, 1989, demanding recognition. This letter was received by Respondent on March 29.

Immediately after receiving the Union's demand letter, Wright telephoned employees at home. Employee McKinley Woods, who testified about his conversation with Wright, incorrectly placed this conversation on March 28, while the demand was not received until March 29. I do not place any great significance on this minor discrepancy since it is clear from the testimony of both Woods and Wright that the conversation did take place and occurred after Wright received the Union's demand. Woods testified credibly that Wright asked if he ''was aware that a union was being formed'' and whether Woods was ''for the union coming in against [Respondent].'' Woods told Wright he supported the Union. Wright told Woods that he could not understand why the employees would support the Union in light of Wright's ''open-door policy.'' Woods testified credibly Wright stated that Respondent did not ''need anybody coming in telling [him] what to do because it would only cause attitudes and friction.'' Wright then told Woods, ''I am the boss of the company and I can close it down.'' During this conversation, Wright also asked Woods if there were ''any problems at TATS.'' Woods replied that he would like to know how Wright comes up with the pay scale. As Woods pursued the issue, Wright told Woods that he could not discuss anyone else's pay. Woods testified that he never received an answer to his question about the pay scale.

Wright admitted telephoning employees about the Union. Wright admitted further that the purpose of these calls was to ask what were ''the reasons for'' the Union's demand letter and to find out ''if [employees] were participating'' in the organizing campaign. Wright admitted, ''I asked if they were participating.'' According to Wright he did this because he had been assured by employees and by Hooks that the union organizing campaign would not be directed toward his employees but only toward Greyhound. Although Wright denies threatening employees or engaging in any unlawful activity in these telephone calls, Wright even corroborates Woods' testimony to some extent. Wright confirms he mentioned his ''open-door policy'' and further admits telling employees that Respondent would ''be willing to hear what they have to say or hear any complaints and move accordingly.'' Wright attempted to soften his statement about closing of the business by claiming that he was merely predicting economic consequences of unionization.

To the extent there is a discrepancy between Woods and Wright, I credit Woods. Regardless of his personal motivation for calling the employees, I find that Wright individually interrogated employees concerning their union activities and sympathies as well as those of other employees.[2] I find as well that Wright solicited grievances from Woods and impliedly threatened plant closure. In its posttrial brief, Respondent argues that there was no solicitation of grievances and no violation of the Act since Woods admitted he was not able to receive an answer to his question about the pay scales. Whether employees have their questions answered is simply not relevant. The violation stems from Respondent soliciting the grievances and impliedly promising to remedy them, whether or not it actually remedies them.

After telephoning employees individually and asking them if they were participating in the union campaign, Wright prepared a document dated March 31, 1989, which he distributed to employees requiring them to sign a statement either confirming or denying their support for the Union. Employee Woods testified credibly that even after he indicated his support for the Union and returned the statement form to Wright, Wright questioned him further about why he would want a union.

I find that both the poll of employees and the further questioning of Woods constitutes further unlawful interrogation of employees about their union activities and sentiments. Respondent's subjective motivation for interrogating employees is not determinative of its lawfulness. The act of interrogating employees individually about their union activities and sentiments must be viewed objectively as itself being intimidating and coercive to employees. The Board has recognized certain exceptions to this general proposition, of course, where such interrogation is directed at known union adherents whose activities are open and notorious. Such is not the case here, where Respondent was under the impression that union activities were not being directed toward nor, or engaged in, by its own employees. I find that Wright's interrogation of employees violated Section 8(a)(1) of the Act.

D. *Termination of Oliver Hooks*

On or about December 8, 1988, Respondent received a memorandum from MARTA concerning a customer complaint about Oliver Hooks. Hooks was given an informal warning. As a result of a later complaint, on March 16, 1989, Wright suspended Hooks as the regular driver on Route 718 and placed him on the ''extra-board.'' After March 16 and before Hooks' termination on March 31, however, Wright used Hooks on several occasions to drive Route 718. On March 31, 2 days after receiving the Union's demand letter, and after interrogating other employees and requiring them to sign the poll indicating whether they supported the Union, Wright terminated Hooks.

Wright testified that he terminated Hooks because of the customer complaints against Hooks and not because of any union activity. In fact, Wright testified at one point he was not even aware that Hooks was involved with the Union prior to Hooks' suspension. I do not credit Wright in this regard. Elsewhere Wright admitted that Hooks was ''the cause of the Union coming.'' More significantly, Wright testified that prior to receiving the Union's demand, ''I had been informed by Oliver Hooks and the other workers . . . that they had agreed . . . they would not organize against TATS because they had no grievances or problems with TATS Corporation.'' It is quite apparent from Wright's testimony he was fully aware Hooks was heavily engaged in union activity, but was under the impression that it was not directed at his own employees. When Wright received the Union's demand, he was obviously shocked. He interrogated individual employees and required each employee to sign a poll ac-

[2] I credit Reggie Wall's testimony that in a conversation with Wright, Wright asked if discriminatees Mobley, Hammond, and Huff knew Oliver Hooks or if they were ''tied up with this union mess.''

knowledging whether they supported the Union. He also took immediate action to terminate Hooks.

Wright not only testified that he terminated Hooks because of the customer complaints, but that the was required to terminate Hooks because of an ''ultimatum'' he received from the prime contractor, MARTA, to terminate Hooks. This ultimatum to discharge Hooks allegedly came from Darice Gamble, MARTA's contract services coordinator. Gamble was called as a witness by counsel for the General Counsel on rebuttal. Gamble unequivocally denied instructing Respondent to terminate Hooks. Gamble testified that after referring the customer complaint to Respondent, she was not informed of the results of the alleged investigation by Wright. Nor was Gamble aware that Hooks had been discharged. After being questioned by both counsel for the General Counsel and counsel for Respondent, I also questioned Gamble once more:

> Q. [The Court] Are you absolutely positive that you did not instruct Wright to discharge Mr. Hooks?
>
> A. [The Witness] Absolutely positive. I did not instruct them to terminate him.

I found Gamble totally candid and credible. I conclude that she never directed or even suggested to Respondent that it terminate Hooks. I conclude as well that Wright simply lied about that in order to try to build a smoke screen behind which he might hide. The false testimony proffered by Wright itself warrants an inference that his motive for terminating Hooks was unlawful.

What evidence is available also reflects Respondent's disparate treatment in terminating Hooks. Wright himself admitted that he has received customer complaints about other drivers. When pressed, Wright admitted that employee Ada Harmon received numerous complaints ranging from being late for runs to failing to complete her routes. Despite this, Respondent did not impose any discipline whatsoever on Harmon. The only explanation advanced by Wright for the difference was that he was not directed to take action against her but that he was directed to discharge Hooks, a claim which I find completely false. I note, too, that Respondent failed to produce subpoenaed records in this case, including ''customer complaints'' about employees. Failing to produce these subpoenaed documents precluded counsel for the General Counsel from further demonstrating disparate application of discipline. Respondent's failure to produce the subpoenaed records warrants the drawing of an adverse inference against Respondent that if they had been produced, the records would not support its position but rather would demonstrate further disparate treatment.

Considering all the evidence, I conclude that when Respondent received the Union's demand, Wright seized on the customer complaint as a rationalization to terminate Hooks. Wright had received the customer complaint at least 2 weeks before the discharge, and during that time allowed Hooks to work. Seizing on the customer complaint as reason to terminate Hooks represents a classic case of pretext. Wright went too far, however, in trying to shift the blame for the discharge decision to someone else by claiming he had received an ''ultimatum'' to discharge Hooks, a claim which was shown to be patently false. I conclude and find that Respondent discharged Hooks because of his union activity, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

E. *The Change in Schedules*

Following a Board-conducted election in which employees voted unanimously to be represented by the Union, the Board certified the Union on September 18, 1989.

On or about November 16, 1989, Respondent received notice through its premium statement of an unannounced increase in Workers Compensation Insurance. Wright testified that the increase in premiums was from approximately $2400 to $11,600. Documents introduced by Respondent, however, reflects the actual premium cost to be only $6800, not $11,600. Nevertheless, the fact that there was an increase is not disputed.

Wright testified that he was immediately faced with the decision to reduce expenses or go out of business. As Respondent states in its posttrial brief, ''*one alternative* to reducing expenses . . . was to have drivers work both the morning and afternoon shift.'' (Emphasis added.)

By letter dated November 28, and distributed to employees on that date, Wright informed the MARTA drivers, ''Due to the increased cost of worker's compensation insurance . . . we must cut back in staff. Therefore, it is regrettable but effective December 8, 1988, your position is being phased out.'' In its posttrial brief, Respondent argues that ''this letter was intended only to generate discussion.'' Respondent appears to argue by implication that the letter did not effect a change in working conditions of employees. If indeed this is Respondent's argument, it is rejected. Nowhere did the letter state or even imply that Respondent was only trying to generate discussion. On its very face, the letter notified employees that Respondent ''must cut back in staff.'' It thanked those employees to whom it was given ''for the service you have rendered'' and wished them ''the very best in your future endeavors.'' This letter quite clearly terminated their employment, and I so find.[3] There is no dispute that this change in operation was made without notice to, or consultation with, the Union. Board law is clear that such unilateral changes based on economic considerations violate Section 8(a)(1) and (5) of the Act. *LaPeer Foundry & Machine*, 289 NLRB 952 (1988). Counsel for the General Counsel contends, however, that the change was also motivated by discriminatory intent, and the parties spend considerable portions of their posttrial briefs discussing the motive for Respondent's change in operations.

The November 28 change in operations affected only the part-time MARTA drivers who also happened to be the union supporters. Wright testified that it was his intent to retain all the MARTA drivers, but to work them on charter bus routes. I reject this claim altogether. It is not only inconsistent with the letter to employees dated November 28, but statements made by Wright to employees credited above. Be that as it may, Wright claims that MARTA drivers were

[3] I note, too, that Wright's statements to employees clearly reflect that a change had been made and that Wright was not simply looking for ideas. Employee Lewis Mobley testified credibly that when he asked Wright if the letter meant he was fired, Wright replied, ''well, unless you can work out something where you can work in the evening time.'' On cross-examination, Mobley again testified credibly that Wright informed him, ''I got to let you go. We've got to cut back.''

never terminated but were simply permanently replaced when they went on strike on December 4. Wright claimed that he received a telephone call warning him that the MARTA drivers were going to go on strike on December 4, and, as a result, Greyhound instructed him to ''move the equipment.'' Wright also testified that prior to any picketing activity, he was informed by Greyhound to obtain replacement drivers to take the jobs of MARTA drivers.

On cross-examination, Wright admitted that neither the Union nor any of the discriminatees ever informed Respondent that a strike was planned for December 4. Nevertheless, when the discriminatees arrived to work on December 4, Respondent had not only moved the equipment but already hired replacements for the MARTA drivers. While there was some confusion even among employee witnesses themselves as to the exact time they began picketing, all of these witnesses testified that picketing did not begin until after Wright departed from Respondent's facility carrying the replacement workers to the hidden buses. Wright is simply not a credible witness, and I reject his contrived testimony regarding the strike. I find that Respondent unilaterally effected the change in working conditions on November 28 which had the effect of constructively terminating all of Respondent's employees who worked for MARTA effective December 8. I find that the picketing by employees was actually the result of and in protest of Respondent's unlawful unilateral action. In its posttrial brief, Respondent argues that ''a dissident group of employees, who are now the petitioners, unlawfully and without notice to the Union went on strike on December 4.'' Respondent makes no clear argument in what way the strike or picketing was unlawful. Quite obviously the Union and Respondent have never negotiated any ''no-strike'' contract provision, and the mere fact that employees did not get permission from or notify the Union does not make their strike unlawful. Contrary to Respondent's argument that the strike was unlawful, it was quite clearly a spontaneous unfair labor practice strike precipitated by Respondent's unlawful unilateral change in the work schedules of employees which resulted in the termination of MARTA drivers who worked for Respondent and who supported the Union.

Wright's own testimony also evidences that the November 28 change in operations was motivated at least in part by a discriminatory intent. When asked if the change in operations was due solely to the insurance increase, Wright replied in the negative. Wright testified:

> A. [By Wright] That's because of the morale of the drivers had dropped to the point where there was a lot of harassment going on and a lot of other intimidating activities going on. So I had to make a move at that particular time.
>
> Q. [By counsel for the General Counsel] What kind of intimidating activities were going on, Mr. Wright?
>
> A. The non-MARTA drivers were being called incompetent fools, dummies and this kind of thing from the MARTA drivers because they did not—
>
> Q. Join the Union?
>
> A. Right.

It is clear from Wright's testimony that the union activity of MARTA drivers was considered by Respondent to be causing morale problems. As Wright stated, ''so I had to make a move at that particular time,'' and he did so by issuing the letter dated November 28. I find merit to counsel for the General Counsel's argument that an unlawful and discriminatory motive was at least part of the reason for Wright's action on November 28 which resulted in termination of MARTA drivers. In the circumstances of this case, it is not necessary to determine whether the employees might have been terminated in any event even without an unlawful motive since their termination was unilateral and also violated Section 8(a)(1) and (5) of the Act. Stated differently, one could say it is clear that employees would have been terminated even without regard to an unlawful motive since, without the unlawful motive, they were terminated for economic reasons but unilaterally and still in violation of Section 8(a)(1) and (5) of the Act. I find that on November 28, 1989, Respondent discriminatorily and unilaterally changed the work schedules of employees which resulted in the termination of employees Mobley, Hammonds, and Huff, and Respondent thereby violated Section 8(a)(1), (3), and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Tuskegee Area Transportation System, is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Transit Union, Local 1600 is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. John Wright interrogated employees about their union activities and sentiments, and the union activities and sentiments of fellow employees; and Respondent thereby violated Section 8(a)(1) of the Act.

4. John Wright threatened employees with reprisals, including plant closure, for engaging in union activities; and Respondent thereby violated Section 8(a)(1) of the Act.

5. John Wright solicited grievances from employees and impliedly promised to remedy them in order to discourage employees from engaging in union activities; and Respondent thereby violated Section 8(a)(1) of the Act.

6. Respondent terminated employee Oliver Hooks because of his activities on behalf of, or support for, the Union; and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

7. After the Board certified the Union on September 18, 1989, as the exclusive bargaining representative of its employees, Respondent unilaterally changed the work schedules of employees and thereby terminated employees Lewis Mobley, Jerome Hammonds, and Jorge Huff, without notifying the Union or giving it an opportunity to bargain about such matters; and in part because the named employees supported the Union; and Respondent thereby violated Section 8(a)(1), (3), and (5) of the Act.

8. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Board held in *Lapeer Foundry*, supra, that an unlawful failure to negotiate over a layoff decision in violation of Section 8(a)(5) of the Act requires that the employer's backpay liability run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent position or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, with appropriate interest.

Respondent shall be ordered to restore the status quo ante by restoring the conditions it unilaterally changed and by continuing them in effect until it fulfills its bargaining obligation, and to make employees whole for any loss of wages or other benefits due to Respondent's unilateral actions, with interest, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1980).

[Recommended Order omitted from publication.]

Frank F. Rox Jr., Esq., for the General Counsel.
Velma L. Jackson, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. On May 7, 1991, I issued a decision in this proceeding finding that Tuskegee Area Transportation System (TATS or Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). I found that Respondent did so by interrogating employees about their union activities and sentiments, and the union activities and sentiments of fellow employees; by threatening employees with reprisals, including plant closure, for engaging in union activities; by soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from engaging in union activities; by terminating employee Oliver Hooks because of his activities on behalf of, or support for, Amalgamated Transit Union, Local 1600 (the Union); by unilaterally changing the work schedules of employees and thereby terminating employees Louis Mobley, Jerome Hammonds, and Jorge Huff, without notifying the Union or giving it an opportunity to bargain, and in part because the named employees supported the Union. I ordered that Respondent cease and desist from such unlawful activities, and I ordered Respondent to take certain affirmative action to remedy these violations of the Act.

Respondent filed exceptions to my decision with the Board. On November 19, 1991, the Board issued an Order remanding this proceeding to me for a limited purpose as indicated below. The Board noted that in finding Respondent had unilaterally changed the work schedules of employees, thereby terminating Mobley, Hammonds, and Huff, without notifying the Union or giving it an opportunity to bargain about such matters, I quoted and relied in part on a letter dated November 28, 1989, which was distributed to employees on that date. Such a letter was indeed distributed on that date. In my decision, however, I mistakenly quoted not from the letters distributed to employees but from a similar letter given to Reginald Wall, who was a statutory supervisor. Since I appeared to reach certain conclusions and make certain credibility resolutions on the bases of the letter quoted, the Board remanded this proceeding to me for reanalysis of the evidence ''in light of all the letters sent by the Respondent.''

First, I note that the remand does not affect my findings that Respondent unlawfully interrogated employees about their union activities; threatened employees with reprisals, including plant closure, for engaging in union activities; solicited grievances from employees; or terminated employee Oliver Hooks because of his activities on behalf of Amalgamated Transit Union, Local 1600. All of those findings are undisturbed and serve as the backdrop for Respondent's unilateral change of employee work schedules.

I correctly stated in my earlier decision that on November 28, 1989, Respondent distributed a letter to employees notifying them of a ''cutback in staff.'' The letter sent to Supervisor Reginald Wall, which I quoted in my earlier decision, is very similar to but slightly different from the letter given to statutory employees. The letter to Supervisor Wall states a specific date of December 8, 1989, on which his position ''is being phased out.'' The letters to statutory employees Hammond and Huff state in their entirety:

> I am writing this letter to inform you that due to the increased cost of workmen's compensation insurance and TATS inability to secure an increase in operating capital from GLI, we must cut back in staff by employing persons who can work both, the morning and evening, shifts. If you feel that your schedule will allow you to work both shifts, please contact me immediately for consideration. If not, you will be allow [sic] to work until a replacement if [sic] found.
>
> I want to take this opportunity to thank you for the service you have rendered to the Tuskegee Area Transportation System, and I look forward to a continue [sic] good working relationship.

As I stated in my earlier decision, Respondent argued in its posttrial brief that ''this letter was intended only to generate discussion.'' I noted that Respondent appears to argue by implication that the letter did not effect a change in working conditions of employees. I rejected that argument, and I do so again. The letter to Hammond and Huff, as well as the version given to Supervisor Wall, states on its face that Respondent ''must cut back in staff.'' In the version of the letter given to statutory employees, it states, ''We must cutback in staff by employing persons who can work both, the morning and evening, shifts.'' As I found in my original decision, TATS was awarded a minority subcontract to provide morning and afternoon rush hour bus service limited to only two routes of MARTA (Metropolitan Atlanta Rapid Transit Authority). Because Respondent has no work for drivers between the morning rush hour and the afternoon rush hour, Respondent hired full-time MARTA drivers who would work either morning or afternoons for Respondent when not sched-

uled to work with MARTA. There is no question Respondent knew that by limiting employment to persons who could work both the morning and evening shifts, its employment of full-time MARTA drivers would be eliminated. That is precisely why Respondent told employees, ''If you feel that your schedule will allow you to work both shifts, please contact me immediately for consideration.'' That Respondent was in fact terminating these full-time MARTA drivers from its employment is shown as well by the statement that if they are able to meet Respondent's time demands, they should contact Respondent ''immediately *for consideration*.'' I reiterate my earlier finding that the letters distributed to employees on November 28 effectively terminated their employment. For the reasons stated in my earlier decision, I find that this unilateral change violated Section 8(a)(1) and (5) of the Act.

Also for the reasons stated in my earlier decision, I reject the claim by John Wright, Respondent's owner, that he intended to retain all the MARTA drivers, but to work them on charter bus routes. The letters to employees say absolutely nothing about being retained in different positions. Further, as I indicated in my earlier decision, this claim by Wright is totally inconsistent with the letter to employees which state that ''Due to the increased cost of worker's compensation insurance . . . we must cut back in staff.''

Finally, I reject for the reasons stated in my earlier decision Respondent's claim that MARTA drivers were never terminated but were simply permanently replaced when they went on strike on December 4. As I stated therein, Wright is simply not a credible witness, and I reject his contrived testimony regarding the strike. My assessment of Wright's credibility is in no way dependent on the phraseology or content of the November 28 letter to employees, but rather on my observation of him as a witness. I withdraw my finding that the letter to employees effectively terminated their employment as of December 8, but I reiterate my finding that Respondent unilaterally effected the change in working conditions on November 28 which had the effect of constructively terminating all Respondent's employees who worked for MARTA. Further, I reiterate my finding that the picketing by employees on December 4 was actually the result of, and in protest of, Respondent's unlawful unilateral action which resulted in their termination. Finally, for the reasons stated in my earlier decision, I find that the November 28 change in operations was motivated at least in part by a discriminatory intent. The evidence supporting that conclusion is discussed in my earlier decision and is in no way dependent on the phraseology or content of the November 28 letter to employees. In conclusion, therefore, I reiterate my earlier finding that on November 28, 1989, Respondent discriminatorily and unilaterally changed the work schedules of employees which resulted in the termination of employees Mobley, Hammonds, and Huff, and Respondent thereby violated Section 8(a)(1), (3), and (5) of the Act.

This supplemental decision does not require any modification of my earlier decision regarding conclusions of law, the remedy, the remedial Order, or the attached notice to employees. Accordingly, those matters remain unchanged.[1]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.